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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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ARGUMENT

As one of their principal contentions, respondents have argued that "when a witness has been wrongfully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coerced testimony and its derivative use."[1]

1. Petitioner's Brief, No. 74-80 at 66, citing *Kastigar v. United States*, 406 U.S. 411 (1972); *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 72 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

Subsequent to the filing of Petitioner's brief[2] this Court decided *Maness v. Meyers*, 43 U.S.L.W. 4143 (United States, January 15, 1975). Petitioner submits that this case has great relevance to respondents' important argument that petitioner may be returned to the *status quo ante*. Thus, he submits this supplemental brief to deal with the important and highly relevant considerations raised by *Maness*.

In *Maness v. Meyers*, this Court granted *certiorari* to decide whether in a state civil proceeding a lawyer could be cited for contempt for advising his client, a party to the litigation, that the client could refuse on Fifth Amendment grounds to produce subpoenaed materials.[3] Petitioner, a lawyer, represented a client who had been subpoenaed to produce in a civil proceeding certain allegedly obscene magazines he was selling. It became clear that petitioner would advise his client not to produce the magazines on Fifth Amendment grounds. Opposing counsel argued that if petitioner's client produced the magazines he would be amply protected because in any ensuing criminal action he could move to suppress or object to the introduction of the magazines in evidence on Fifth Amendment grounds.[4] This Court squarely answered this argument in language that has great relevance to the contention of the respondents set out above.

Initially, this Court recognized that all court orders were to be complied with promptly, since prompt compliance led to the orderly and prompt administration of justice.[5] A different situation arose, however, if the court, during trial, ordered a witness to reveal information. Here com-

2. Petitioner has already filed his Reply Brief in No. 74-80.
3. 43 U.S.L.W. at 4144.
4. *Id.* at 4147.
5. *Id.* at 4146.

pliance could cause irreparable injury since the appellate court could not always "unring the bell" once the information was released.[6] Since this was a special situation, this Court recognized an alternative avenue available to the person in this situation: under *United States v. Ryan*, 402 U.S. 530, 532-33 (1970), he could comply, or refuse and expose himself to an adjudication of contempt.[7] This Court found that this method of achieving pre-compliance review was particularly appropriate when the Fifth Amendment privilege against self-incrimination was involved. Since the privilege had always been broadly construed to ensure that an individual was not compelled to produce evidence which later could be used against him in a criminal action, *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), and in view of the fact that it was "respect for the individual" which was the bedrock of the privilege, this Court found that the procedure in *Ryan* was an eminently reasonable method to challenge the order to produce.[8] Thus, in this preliminary exposition, this Court re-affirmed that stature to be afforded the Fifth Amendment privilege. This Court stressed a procedure that would prevent pre-review disclosure of information.

This Court then dealt with the contention of opposing counsel below "that if petitioner's client produced the magazines he was amply protected because in any ensuing criminal action he could always move to suppress, or object on Fifth Amendment grounds to the introduction of the magazines into evidence."[9]

First, this Court intimated that waiver problems could certainly arise if the magazines were produced.[10]

6. *Id.* at 4147.
7. *Ibid.*, citing *United States v. Ryan*, 402 U.S. 530, 532-33 (1971).
8. *Ibid.*
9. *Ibid.* footnote number omitted.
10. *Ibid.*, citing *Rogers v. United States*, 340 U.S. 367 (1951).

Secondly, and more importantly, it found that such a procedure "would not afford adequate protection."[11] As this Court recognized, without something more (a grant of immunity), the witness "would be compelled to surrender the very protection which the privilege [was] designed to guarantee."[12] The witness would be letting the "cat out of the bag" with no assurance that a later objection or motion to suppress would put it back.[13] Thirdly, this Court distinguished *United States v. Blue*, 384 U.S. 251, 255 (1966), on the crucial ground that Blue had voluntarily turned over the requested information to the government without asserting his Fifth Amendment privilege. In other words, Blue had waived his rights.

Thus, by expressly disavowing the procedure stressed by opposing counsel in the lower court, this Court has expressly rejected respondents' position that even if petitioner was wrongfully deprived of his privilege against self-incrimination, he could be returned to the *status quo ante* merely by suppression of the coerced testimony and its derivative use.[14] In the area of the Fifth Amendment privilege, the harm is done when the information is divulged. It is irreparable since, as this Court recognized, the appellate court could not always "unring the bell" once the information had been released.[15] Once the information is divulged it could be used in many ways that could not be affected by any later order suppressing use of the information itself.

In this sense, the irreparable injury caused Helfant is illuminated. When he was coerced by the New Jersey

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11. *Ibid.*
12. *Ibid.*, quoting from *Hoffman v. United States*, 341 U.S. 479, 486 (1951).
13. *Id.* at 4148.
14. See note 1, *supra*.
15. 41 U.S.L.W. at 4147.

Supreme Court to waive his Fifth Amendment privilege the "cat was out of the bag." The very right he was seeking to assert was violated and nothing could undo this damage. Unlike the defendant in *United States v. Blue*,[16] Helfant did not voluntarily waive his rights and thus this case can be of no help to respondents.[17]

Furthermore, this analysis vitiates respondents' contention that the false swearing counts of the state indictment can be analytically distinguished from the substantive counts.[18] It must be remembered that the opinion of the Court of Appeals for the Third Circuit did not distinguish between these counts,[19] and that Court refused to reconsider its position on this point. Respondents expressed surprise at this position.[20] The simple answer, of course, is that the Court of Appeals recognized what was implicit in *Maness v. Meyers:* for Fifth Amendment purposes, considering the values the Amendment seeks to protect, there can be no distinguishing between the counts. Once the information is released, the constitutional harm has occurred.[21]

Moreover, the Court of Appeals recognized that the petitioner was suffering irreparable injury on all counts since the lack of an adequate state forum applied to the entire indictment. It was the entire state judicial system that was subject to the tremendous power of the Chief

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16. 384 U.S. 251 (1966).
17. See Petitioner's Brief, No. 74-80 at 64.
18. *Id.* at 55-72.
19. *Helfant v. Kugler*, 500 F.2d 1188 (3d Cir. 1974).
20. Petitioner's Brief, No. 74-80 at 55.
21. Four counts of the seven count indictment were for false swearing. An examination of the State indictment shows that the false swearing counts were inextricably intertwined with the substantive counts; actually they were the substantive counts with the additional allegation that Helfant did not tell the truth about certain of the substantive allegations when he testified after being coerced by the New Jersey Supreme Court. In essence, Helfant was accused of not agreeing with the allegations of three convicted felons.

Justice[22] and all appeals covering any part of the indictment would eventually come before the very court alleged to have engaged in the coercion. This is the reality of this case; this is the legal position confronting the petitioner.

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22. In this regard, a recent amendment to the Rules Governing the Courts of the State of New Jersey, effective April 1, 1975, is very instructive: "The Chief Justice of the Supreme Court shall be responsible for the administration of all courts in the State. He shall appoint an Administrative Director of the Courts to serve *at his pleasure*. • • • The Chief Justice shall designate a judge of the Supreme Court as Assignment Judge for each county, to serve *at his pleasure*, and a judge of each multiple-judge county district court and juvenile and domestic relations court as presiding judge of such court, to serve *at his pleasure*. • • •" *R. 1:33-1* (emphasis added).

CONCLUSION

Maness v. Meyers demonstrates the falacy of respondents' position and illuminates the irreparable constitutional harm petitioner has suffered and continues to suffer. It demonstrates once again that this Court should enter an order permanently enjoining petitioner's state criminal prosecution or, in the alternative, remand this matter to the District Court for further proceedings.

Respectfully submitted,

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